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Supreme Court of the United States

OCTOBER TERM, 1943
No. 105

EASTERN-CENTRAL MOTOR CARRIERS ASSOCIATION, MIDDLE ATLANTIC STATES MOTOR CARRIER CONFERENCE, INC., and CENTRAL STATES MOTOR FREIGHT BUREAU, INC.,

Appellants,

vs.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Appellees.

REPLY OF APPELLANTS TO THE BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

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REPLY OF APPELLANTS TO THE BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION.

This short reply brief is respectfully submitted mainly for the purpose of disavowing certain contentions which the Government attributes to appellants and then devotes most of its brief to knocking down.

I

WHEN THERE EXISTS A DISCRIMINATION IN FACT AND HENCE IN LAW AS BETWEEN SHIPPERS UNDER DIFFERENT TRANSPORTATION RATES APPELLANTS DO NOT QUESTION THE AUTHORITY OF THE COMMISSION TO ORDER ITS REMOVAL FOR THE FUTURE EVEN IN THE ABSENCE OF PROOF OF HURTFUL INJURY TO PARTICULAR SHIPPERS.

Appellants in their main brief assert as a matter of law that no findings were made by the Commission indicating that *any discrimination in fact* as between shippers would

here occur in the future. Such findings as the Commission made on the subject show as a matter of law that no such discrimination in fact or law would exist. In that respect appellants' position is that there is offered to any shipper at any given locality the mere choice of rate and minimum weight dependent only upon the individual shipper's election of the particular weight to be tendered for shipment at one time on one bill of lading from one consignor to one consignee. There being no "multiple truck" rates involved, and the proposed 30,000 pound minimum weight being in accordance with general commercial standards as reflected by railroad carload minimum weights, there cannot possibly be any preferred class of "large" shippers or those whose distinctive economic position enables them to utilize the lower rates and higher minimum weight as against "small" competing shippers not so situated.

As if to overcome that fundamental contention of appellants' counsel for the Government say in their brief that the mere absence of shipper testimony of individual pecuniary damage does not, except in reparation cases, deprive the Commission of authority, as the guardian of the shipping public, to reach in the ordinary case a conclusion of discrimination. Appellants do not question the doctrine of law pointed to by the Government. They simply say it has no application to a case such as this where the contention is that without regard to the presence or absence of shipper witnesses concerning pecuniary damage the reports of the Commission show on their face there would be no unequal treatment of shippers either in fact or in law which would enable the Commission to make the character of order here involved.

II

WHEN CARRIERS OFFER A CHOICE OF TWO RATES DEPENDENT UPON THE MINIMUM SHIPPING WEIGHTS, EACH WITHIN THE ZONE OF REASONABLENESS, AND THERE IS NO RESULTING DISCRIMINATION IN FORM OR SUBSTANCE, THE ABSENCE OF A SHOWING OF DIFFERENCE IN CARRIER OPERATING EXPENSE CANNOT CREATE A DISCRIMINATION WHICH OTHERWISE IS LACKING.

Government counsel urge that in respect to rates and minimum weights between the same localities, over the same routes, carriers are not permitted, in the absence of a difference in operating expense, to offer to the shipping public a choice of different rates dependent upon the quantity shipped. In support of their position they cite and rely upon cases of the Commission and this Court in which, as a *justification* for an actual discrimination, the matter of differing carrier operating expense has been deemed of importance.

The position of appellants, in respect to that argument of the Government, is that it has no application to the issues which this case presents. If there be not otherwise forbidden discrimination between shippers then the comparative carrier operating expense is immaterial to any issue of discrimination. If, in this case, there appeared to exist a condition of threatened discrimination otherwise unlawful respondents would of course be under the compulsion of demonstrating that the discrimination would be justifiable because of a difference of carrier operating expense or because of some other dissimilar circumstance such as competition. But the mere absence of a demonstrated difference in carrier operating expense cannot cause two rates to be unlawfully discriminatory in their relation to each other when any shipper is at liberty to make the choice and there are no inherent economic infirmities which favor some to the disadvantage of others.

III

APPELLANTS DO NOT CONTEND THAT COMPETITION IS AN INVARIABLE DEFENSE TO A DISCRIMINATION OTHERWISE UNLAWFUL NOR DO THEY DENY THE COMMISSION'S POSSESSION OF POWER, UNDER PROPER FINDINGS, TO UPHOLD OR DENY THE DEFENSE OF COMPETITION IN ACCORDANCE WITH WHAT THE FINDINGS WOULD DICTATE. HERE THE COMMISSION MADE NO FINDINGS WHATSOEVER AS TO WHY COMPETITION SHOULD NOT PREVAIL.

Again appellants respectfully say that if there would be no discrimination in fact or in law no need exists for them to justify the difference in rates and minimum weights, as far as concerns the issue of discrimination, either on the ground of competition or anything else. However, they further say that even if it could be considered that some element of discrimination would be present in the tariffs here involved, their business course in proposing it is dictated by competitive necessity. To that they add the consideration that Congress favors healthy competition between carriers and ordinarily it is a proper defense which, when made as here, puts upon the Commission the clear duty of determining whether it is a proper defense and if not to say frankly why not.

Here the Commission rejected the defense of competition for no stated reason whatsoever. It asserted nothing more than the arbitrary authority to determine, as a matter of its own "policy", to deny the defense. Government counsel, seeking to support that unusual position of the Commission, say in their brief that while the Commission did not in terms so find yet what it did was to reject the defense competition because there was no showing of a difference in carrier operating expense.

There again the argument moves around the circle. The question of competition comes into the case at all only in the event some conclusion of discrimination shippers would otherwise be warranted in fact and in law. *Even in the absence of a demonstrated difference in carrier operating expense discrimination between shippers may be warranted by the presence of competitive necessity.* That was the holding of this Court in the recent *Barringer* case. The strength of the defense of competition in cases of actual discrimination would seem to be such that before the Commission, in any instance, may reject it, something in the nature of cogent findings would have to be made sufficient to satisfy this Court that the Commission's action was not purely arbitrary and based only upon its own declared "policy".

IV

APPELLANTS CONTEND THAT AS A MATTER OF LAW IT IS NOT UNREASONABLE FOR MOTOR CARRIERS TO OFFER A QUANTITY RATE GOVERNED BY A MINIMUM WEIGHT SOMEWHAT GREATER THAN MAY BE PHYSICALLY OR LEGALLY LOADED INTO SINGLE TRUCK VEHICLES WHEN THAT REQUIRED MINIMUM WEIGHT IS COMFORTABLY WITHIN THE ESTABLISHED TRADE UNITS OF SHIPMENT. THIS IS SO NOTWITHSTANDING THE CARRIERS' OPERATING EXPENSE PER 100 POUNDS, ALTHOUGH MUCH SMALLER THAN FOR LITTLE SHIPMENTS, IS NO LESS WHEN THE MINIMUM WEIGHT CALLS FOR THE PARTIAL USE OF A SECOND TRUCK VEHICLE THAN WHEN THE WHOLE SHIPMENT MAY BE PUT INTO ONE VEHICLE.

Government counsel do not question and the Commission did not find the absence of a sharp difference between carrier operating expense for little shipments (for instance 5000 pounds) and larger shipments such as 20,000 or 30,000

pounds. What the Commission here has done is to say that it is an unreasonable thing for motor carriers to offer any rate on quantity shipments when the prescribed minimum quantity applicable to that rate exceeds the amount that may be placed in a single truck vehicle, even though the minimum is in accordance with trade shipping units as measured by railroad carload minimum weights. In support of its position the Commission, both in its reports and now in the brief of Government counsel, relies only upon the historical fact that railroad carload rates have at all times since 1887 been governed by minimum weights not exceeding amounts which may be put into single railroad cars. The argument then is that having applied that rule for more than fifty years to railroads the same rule is applicable to motor carriers despite the smaller equipment which they use in order to insure safety of vehicle operations on the highways.

Appellants respectfully urge that the point of view of the Commission is purely arbitrary and is only a matter of its own "policy". The reason for the historical rule is inapplicable to the situation here. The origin of that old rule concerning railroads goes back to the idea that whereas most shippers are economically in position to ship single carloads only a relative few would be in economic position to ship in "multiple cars". Appellants here do not question the propriety of that broad rule in its application to railroads. Indeed they would not here question the impropriety of motor carrier rates if based avowedly upon "multiple truck" minimum weights which look to the favoring of a relatively few large shippers to the disadvantage of the greater number customarily conducting their businesses on ordinary trade units of sale. But what the motor carriers here do respectfully urge is that as long as their quantity minimum weights are comfortably within the established trade units of shipment as measured by railroad carload minimum weights it is neither unreasonable nor discriminatory for them to prescribe such minimum weights regard-

less of the fact that due to physical and legal load limitations their accommodation compels an overflow into a second truck vehicle.

CONCLUSIONS

It is believed that the foregoing establishes that for the most part, if not entirely, the Government's brief is based upon a misconception of the precise contentions which appellants make.

Respectfully submitted,

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